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Opinion following grant of rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LLOYD CARR,

Defendant and Appellant.

B283050

(Los Angeles County
Super. Ct. No. PA086351)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Daniel B. Feldstern, Judge. Affirmed and
remanded with instructions.

Joanna Rehm, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant Attorney
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A jury convicted defendant Lloyd Carr of first degree residential robbery (Pen. Code, § 211; count 1),¹ first degree burglary (§ 459; count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). In a bifurcated trial, the court found true allegations that Carr had certain prior convictions, including two strike priors. The court sentenced him under the “Three Strikes” law to a total term of 36 years to life.

On appeal, Carr challenges several aspects of his sentence and the associated proceedings. Specifically, Carr argues that: (1) the evidence was insufficient to support the court’s true finding regarding three of the prior strike convictions alleged; (2) the court erred by refusing to strike one or more prior strike convictions under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); (3) the court should have stayed the sentence on the burglary count pursuant to section 654; (4) the restitution amount should be reassessed if Carr’s burglary sentence is stayed; and (5) Carr was denied a fair hearing before an unbiased judge.

None of Carr’s arguments provides a basis for reversal. (1) Substantial evidence supports the court’s findings that Carr suffered the prior convictions as alleged; (2) Because Carr’s history of uninterrupted criminal activity—which only escalated despite multiple incarcerations—puts him squarely within the spirit of the Three Strikes law, the court did not abuse its discretion under *Romero* and section 1385; (3) In the process of committing the burglary, Carr formed and pursued an independent intent to take the victim’s property by threat of force, and the court therefore properly imposed sentences for both burglary and robbery counts;

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

(4) Carr's restitution argument is therefore moot; and (5) Carr has identified no judicial misbehavior, let alone misbehavior suggesting bias or prejudice against Carr.

Finally, in a petition for rehearing, Carr requests remand in light of Senate Bill No. 1393, which went into effect on January 1, 2019 and renders discretionary the previously mandatory five-year sentence enhancement under section 667, subdivision (a)(1). We agree that Senate Bill No. 1393's potentially ameliorative amendments should apply to Carr's sentencing. Accordingly, we affirm, but remand so that the trial court may consider whether to exercise its newly awarded discretion to strike any of Carr's prior convictions for the purposes of avoiding section 667, subdivision (a)(1) five-year sentencing enhancement.

FACTUAL AND PROCEDURAL SUMMARY

On May 16, 2016, M.C. returned home to his apartment and found Carr inside holding a pillowcase full of M.C.'s property. M.C. grabbed the pillowcase from Carr and pushed him out the open side door of the home. Carr reentered, pulled out a screwdriver, thrust it toward M.C.'s stomach, telling M.C. to "back the fuck up," until M.C. "threw the [pillowcase] of electronics toward [Carr]" and ran out the front door. M.C. called 911 and waved down a patrolling school police officer. Meanwhile, Carr left the apartment through a side door and waved his screwdriver at neighbors who had come to M.C.'s aid. Police apprehended Carr within minutes. He was in possession of two screwdrivers and property belonging to M.C.

DISCUSSION

I. Sufficiency of the Evidence of Prior Convictions

The information alleged that Carr had 11 prior convictions. After a bifurcated court trial, the court found each allegation true. Carr contends that the evidence is insufficient to support the court's

true findings as to three of these convictions.² Because the court struck two of the three convictions in the interest of justice, we need only consider whether the evidence supports the remaining one: a February 1988³ conviction for attempted burglary in case No. A960941.

A. *Relevant Evidence of Prior Convictions*

At the trial on the prior conviction allegations, the prosecution offered into evidence a section 969 packet (priors packet), containing several abstracts of judgment, fingerprint cards associated with certain convictions, photographs, and other California Department of Corrections (CDC) records. In their briefing and at trial, the parties discussed at length several aspects of the documents contained in this priors packet and related expert testimony. While we have considered the totality of this evidence, we summarize only those aspects that guide our decision regarding Carr's prior conviction arguments on appeal:

1. *Fingerprint evidence*

A fingerprint identification expert, Nina Kaminsky, took a fingerprint exemplar from Carr and compared it to the five fingerprint cards contained in the priors packet. Kaminsky was able to positively identify the fingerprints on three of these five cards as belonging to Carr. These three cards all bore CDC No. "C-76508," the name "Carr, Lloyd" or "Carr, Lloyd Leopold," a

² Los Angeles County case Nos. A960941, A797703, and BA004038.

³ The information alleged that the date of the conviction in case No. A960941 was December 3, 1987. The court amended the information according to proof by interlineating the date of February 17, 1988 in place of the December 3, 1987 date. Carr does not challenge the propriety of the amendment.

birthdate of November 1, 1954, a reference to “LA” or “Louisiana” next to the “Nativity” section, and a signature of “Lloyd Carr.” None of the cards Kaminsky conclusively tied to Carr include any notations related to case No. A960941, however.

With respect to the remaining two fingerprint cards in the priors packet, Kaminsky testified that the poor quality of the images on the cards prevented her from conclusively identifying or excluding Carr as the source of the prints. Although she was able to match certain portions of the fingerprints in these two cards to the fingerprints taken from Carr, this was an insufficient basis to support a conclusive identification. One of these two fingerprint cards bears the handwritten case No. “A96041.” It also contains a description of the offense and cross-references that suggest “A96041” reflects a typographical error and is intended to refer to case No. A960941. This “A960941” card contains some of the same identifying information as the cards Kaminsky matched to Carr: [I]t reflects the name “Carr, Lloyd,” a CDC No. “C-76508,” the entry “Louisiana” next to “Nativity,” and a signature of “Lloyd Carr.” Unlike the other cards, however, the card associated with case No. A960941 lists a birthdate of November 6, 1954.

2. Physical description and photographs

All cards—both those Kaminsky was able to match to Carr’s fingerprints and those she was not—contain physical descriptions that are similar but vary slightly. For example, in all but one card (regarding the conviction in case No. A982455, and not disputed on appeal), the individual is listed as being 5 feet 11 inches tall, and no two cards list the same type or location of tattoos.

The packet also includes two “mug shot” photographs from 2004 and 2016 that identify the individual depicted with CDC No. C-76508. The 2016 photograph also identifies the individual as “Carr, Lloyd.”

3. *Abstracts of judgment and aliases*

The priors packet contains an abstract of judgment for case No. A960941. This abstract includes a handwritten CDC No. “C-76508,” lists the defendant as “Carr, Lloyd,” and notes that the sentence is to be concurrently served with a sentence in case No. A797703. Although case No. A797703 is not listed on any of the fingerprint cards that Kaminsky was able to conclusively link to Carr, the priors packet does include an abstract from the conviction in case No. A797703, which identifies the defendant as “Carr, L[l]oyd” with a handwritten notation crossing out “L[l]oyd” and writing in “Antonio.” This document also contains a cross-reference back to case No. A960941, as well as a cross-reference to a conviction in case No. BA004038. The abstract of judgment for case No. BA004038 contained in the priors packet, in turn, identifies “Carr Antonio” as the defendant. Other documents in the priors packet list “Carr, Antonio” as an alias used by Lloyd Carr.

B. *Trial Court’s Decision at the Priors Trial*

The court concluded that the totality of this evidence left “no doubt whatsoever” that the convictions described in the priors packet referred to the defendant Carr. The court observed that the “Lloyd Carr” signatures on all documents appeared to be the same, and that the photographs, each of which bore the same CDC number listed throughout the priors packet, appeared to be of Carr. The court also considered the cross-references between various convictions listed in the priors packet, though none of these linked case No. A960941 to any conviction Kaminsky had conclusively associated with Carr’s fingerprints. The court acknowledged the inconclusive nature of Kaminsky’s testimony with respect to the conviction in case No. A960941, but viewed this testimony as only one of several relevant factors in assessing the prior conviction allegations.

**C. *Substantial Evidence Supports the Trial
Court’s True Finding Regarding the
Conviction in Case No. A960941***

In reviewing Carr’s true finding regarding the conviction in case No. A960941, we look for substantial evidence to support the finding, “ ‘viewing the evidence in the light most favorable to the prosecution.’ ” (*People v. Earp* (1999) 20 Cal.4th 826, 887.) Where, as here, a “finding[] rest[s] to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify th[at] finding[], ‘but our opinion that the circumstances also might reasonably be reconciled with a contrary finding’ does not render the evidence insubstantial.” (*Id.* at pp. 887-888.) Substantial evidence is “evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined.” (*People v. Conner* (1983) 34 Cal.3d 141, 149.)

When viewed in the context of the whole record, the signature and CDC number appearing on the fingerprint card for case No. A960941 provide such substantial evidence supporting the court’s true finding. The trial court, acting as the finder of fact, compared the signature on the case No. A960941 card and the signatures Kaminsky’s testimony conclusively tied to Carr, and determined they were the same signature. The Evidence Code expressly permits the trier of fact to conduct such a visual comparison as a means of establishing “[t]he genuineness of handwriting.” (See Evid. Code, § 1417.) Thus, the court’s comparison established that the A960941 fingerprint card bears Carr’s genuine signature.⁴ Second, Kaminsky’s testimony that

⁴ Evidence Code section 1417 provides: “The genuineness of handwriting . . . may be proved by a comparison made by the trier of fact with handwriting . . . proved to be genuine to the satisfaction of the court.”

Carr's fingerprints appear on several documents with the CDC No. "C-76508" is persuasive evidence connecting Carr to this number. The trial court's visual comparison between Carr and the individual in mug shot photographs bearing this CDC number further supports that the number is associated with Carr.

Thus, although Kaminsky could not confirm that the fingerprints on the case No. A960941 card were Carr's, that card bears what other record evidence establishes as Carr's genuine signature and his CDC number. The card therefore constitutes substantial evidence that Carr was the defendant convicted in case No. A960941.

II. Court's Refusal to Strike a Prior Felony Conviction

Carr challenges the court's decision not to exercise its discretion to strike at least one of Carr's prior serious felony convictions under section 1385, subdivision (a), and *Romero*, *supra*, 13 Cal.4th at pp. 529–530, which caused Carr to be sentenced as a third-strike offender. In deciding whether to strike a prior conviction on this basis, a court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside [of the Three Strikes sentencing] scheme's spirit, in whole or in part." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) Carr argues that, in deciding not to exercise *Romero* discretion, the court "failed to consider" some of these *Williams* factors, "misapplied other factors," and thereby abused its discretion. We disagree. We address each of Carr's *Romero* arguments below and conclude that the court properly exercised its discretion "in a manner that is . . . consistent with the letter and spirit of the law, and that is based upon an

‘individualized consideration of the offense, the offender, and the public interest’ ” rather than on any improper factors. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 [sentencing decisions reviewed for abuse of discretion].)

A. Court’s Discussion of Carr’s Recidivism

Carr’s criminal history spans an almost 40-year period, during which Carr continuously rotated between crime and incarceration. His prior convictions include 15 felony convictions, among them robbery and two other felonies involving assault or threat of force, as well as numerous theft-related offenses, drug-related felonies, and an attempted escape. Carr also has five misdemeanor convictions, six probation revocations and violations, and 12 parole violations. The court discussed Carr’s criminal history at length at the sentencing hearing. Based on this discussion, Carr suggests the court improperly relied on Carr’s recidivism as a basis for declining to exercise its discretion to strike at least one of Carr’s prior convictions.

The extent of Carr’s criminal record is “ ‘undeniably relevant’ ” to the *Williams* factors and whether Carr falls within the spirit of the Three Strikes Law. (*People v. Garcia* (1999) 20 Cal.4th 490, 501-502.). Of course, the length of a defendant’s record is not “ ‘singularly dispositive,’ ” and a court should not consider it in isolation. (*Ibid.*) But here the court did no such thing. Rather, as it must, the court considered “the entire picture.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981 (*Alvarez*).) This picture reflected a criminal who has repeatedly committed serious felonies, at times has escalated to violent felonies, and whose virtually uninterrupted criminal history suggests he likely will not stop violating the law, even at age 62. The trial court properly exercised its discretion when it concluded that this brings Carr’s burglary and robbery convictions squarely

within the spirit of the Three Strikes law and that Carr should be sentenced as a third-strike offender. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378 [in exercising *Romero* discretion, court must balance relevant factors and reach an impartial decision in conformity with the spirit of the Three Strikes law].)

**B. “[M]itigating” Circumstances of 1988
Conviction and Level of Violence in
Criminal History**

Carr complains that the court did not expressly address the partially nonviolent nature of Carr’s criminal history or what Carr views as the “mitigating nature” of his 1988 conviction, including that it was an unsuccessful attempt from 30 years ago not involving any actual threat of violence. As a threshold matter, the court need not expressly identify every factor it considers in exercising its *Romero* discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 [“The court is presumed to have considered all of the relevant [sentencing] factors in the absence of an affirmative record to the contrary.”].) More importantly, Carr’s argument largely proceeds from the false premise that the Three Strikes law concerns itself solely with *violent* criminals, and that only violent crime poses a danger to the public. Yet, by its own terms, the law metes out more severe punishment for those who repeatedly commit either serious *or* violent crimes. (§ 667, subd. (b); *Alvarez, supra*, 14 Cal.4th at p. 975 [describing Three Strikes law’s “overarching intent” as “‘ensur[ing] longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of *serious and/or violent* felony offenses’ ” (italics added)].) Carr incorrectly implies this is less true in the wake of Proposition 36. But, as amended by Proposition 36, the Three Strikes law still draws a primary distinction between those prior convictions that are “serious and/or violent,” and those that are not, and still includes a stated legislative intent to “ensure longer prison

sentences and greater punishment for those who commit a felony and have been previously convicted of one or more *serious and/or violent* felony offenses.” (§ 667, subd. (b), italics added.) Carr committed multiple serious felonies, some of which—among them, his most recent offenses—were also violent in nature. That his entire criminal history is not laden with violence does not take him outside the spirit of the Three Strikes law. Nor is it a mitigating factor that the 1987 conviction is 30 years old, as there was no significant break in criminal activity during those 30 years. (See *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [reversing order dismissing 20-year-old robbery conviction where “the defendant has led a continuous life of crime after the prior”].)

C. *Need to Protect the Public*

Carr next argues that the court did not properly consider whether “incarcerating Carr for the rest of his life was required to protect the public.” But the court did just that when it considered the increasing severity of Carr’s crimes over time—even at age 62—and the apparent ineffectiveness of his multiple incarcerations in reducing his criminal activity. This record suggests there may not be any period of incarceration after which Carr is “no longer likely to offend again,” as was contemplated in the authority Carr cites. (See, e.g., *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250.) Preventing Carr from continuing to commit crimes—which, apart from his periods of incarceration, he has done virtually without interruption for nearly 40 years—will protect the public from those crimes. This is no less the case because Carr’s crimes have not been consistently violent, particularly given the violence of his most recent offenses. (See Discussion part II.B, *ante*.)

D. *Aggravating Circumstances of the Current Crime*

Finally, Carr contends that the court incorrectly characterized the violent nature of the present offense as “aggravating,” because the crime of assault necessarily involves violence, and because Carr’s offense was not “distinctively worse than other instances of the same offense.” As a threshold matter, the court relied not simply on the violent nature of Carr’s crime, but “a degree of callousness with regard to a man who was simply coming home to his place of residence.” In this respect, Carr’s assault of M.C. was indeed “distinctively worse than other instances of [assault]” that arise under different circumstances.

More broadly, the authority Carr cites to support his argument, *People v. Young* (1983) 146 Cal.App.3d 729, 733-734 (*Young*), is inapposite. This case considered whether a court could use aggravated circumstances to justify *increasing* a defendant’s sentence. (*Ibid.*) Here, Carr is asking us to find error in the court’s refusal to reduce a sentence, an exercise of discretion in which the court may consider “the entire picture” of the defendant, his current crimes, and his prior offenses. (*Alvarez, supra*, 14 Cal.4th at p. 981.) Carr’s reliance on *Young* thus ignores the broad discretion a trial court has under section 1385 and *Romero*.

Carr has failed to identify anything improper in the court’s *Romero* analysis. The court did not abuse its discretion in declining to strike either of Carr’s prior strike convictions.

III. Failure to Stay Sentence on the Burglary Conviction under Section 654

The court sentenced Carr to prison for 36 years to life on the robbery and burglary convictions, with the sentences to run concurrently. The court also sentenced Carr to 35 years to life on the assault conviction, but stayed the assault sentence under

section 654, based on the robbery conviction. Carr contends that the court should have stayed the burglary conviction under section 654 as well. We disagree.

Where a defendant's "indivisible course of conduct with a single intent and objective" leads to convictions for multiple crimes, section 654 prohibits punishment for more than one of those offenses. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1033; see *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) Whether section 654 requires a court to stay a sentence thus depends on "the defendant's objective and intent." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) A court may impose sentences for multiple violations that "share[] common acts or were parts of an otherwise indivisible course of conduct" only if, by engaging in such conduct, the defendant was pursuing "multiple criminal objectives . . . independent of and not merely incidental to each other." (*Ibid.*) Whether this was the case is a question of fact for the trial court, which we review for substantial evidence. (*Ibid.*; *People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

Here, the court found the "original objective of the burglary" was "to enter [M.C.]'s residence uninterrupted, to steal his property and to make his escape without detection." The court based its decision to stay Carr's sentence for assault, but not burglary, on a further finding that the "assault and robbery in this case[,] which includes the application of force or fear upon [M.C.,] was not a part of" that original intent. The court explained that, after M.C. confronted Carr and retrieved some of the property Carr had attempted to steal, Carr made a decision to *again* take that property—this time by force—rather than simply escape with the stolen property he had on his person. Because that decision "created [the] additional counts of the robbery and the assault," the court concluded section 654 prohibited multiple punishment for both robbery and assault, but not for both robbery and burglary.

Substantial evidence supports the trial court's findings regarding intent. The details of Carr's altercation with M.C. suggest Carr was motivated by more than an intent to escape from the scene of the burglary when he assaulted and robbed M.C. Specifically, upon finding Carr in his home, M.C. "walked up to [Carr,] snatched the pillowcase full of [M.C.'s] electronics" out of Carr's hands, and pushed Carr out the side door, such that Carr was "two steps outside the door." At that point, Carr brandished the screwdriver and re-entered M.C.'s home, thrusting it at M.C. until M.C. relinquished the bag of electronics and fled the home. Thus, unlike in the cases Carr cites involving assaults or violence committed in the course of efforts to successfully flee the scene of a burglary⁵ (see, e.g., *People v. Le* (2006) 136 Cal.App.4th 925, 931),

⁵ It bears mention that case law is inconsistent regarding whether and under what circumstances crimes committed in an effort to evade capture after a burglary can provide a basis for additional punishment under section 654. (Compare *People v. Niles* (1964) 227 Cal.App.2d 749, 755 [assault committed while attempting to escape from a burglary could not be separately punished] with *People v. Hooker* (1967) 254 Cal.App.2d 878, 880-881 ["decline to accept the defendant's argument that commission of any crime implies a successful getaway and that hence only one punishment can be imposed for anything that occurs, coming and going, in the course of a criminal caper"]; see also *People v. Perry* (2007) 154 Cal.App.4th 1521, 1526-1527 [appellant did not act "with multiple independent objectives in committing the burglary and the robbery," and could not receive multiple punishment for these charges, where robbery conviction resulted from defendant's violent attempts to evade capture after burglary]; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 529 [crimes "were not incident to a single intent and objective" and thus warranted multiple punishment where, after completing a burglary, defendant "formed the intent to prevent [victim] from calling the police by throwing [a] hatchet through the window at her"].)

Carr could have easily fled after M.C. confronted him. Carr was already outside of the residence with some of the property he was attempting to steal, and M.C. was inside, unarmed, not physically blocking Carr or otherwise attempting to prevent Carr from leaving. Rather than running, however, Carr chose to re-enter the home in an attempt to again steal the sack of electronics from M.C., this time by threatening M.C. with a screwdriver. These facts provide substantial evidence of an independent objective—formed as Carr stood outside the side door of M.C.’s residence—to take M.C.’s property through threat of violence. Such an objective is not merely incidental to Carr’s objective in committing the burglary, and the trial court properly declined to stay the burglary conviction under section 654.

IV. Restitution

Carr contends that, if the court incorrectly sentenced him for both the burglary and robbery convictions, the court is required to reconsider the amount of the restitution and parole revocation fine. Because we conclude the court properly declined to stay the burglary sentence (see Discussion part III, *ante*), Carr’s restitution argument is moot.

We need not address this issue on the current record, however, as substantial evidence supports the trial court’s finding that Carr assaulted M.C. not in an attempt to evade capture, but in an effort to again steal the property M.C. had retrieved. Further, we agree with this court’s observation in *People v. Vidaurri* (1980) 103 Cal.App.3d 450 that “[i]t would be arbitrary to reach a conclusion either that escape is always a part of a continuous transaction which includes the principal offense, or that an escape is never a part of one continuous transaction which includes the principal offense. Whether a course of conduct is divisible depends on the ‘intent and objective of the actor.’” (*People v. Vidaurri*, *supra*, 103 Cal.App.3d at p. 464.)

V. Judicial Bias

Finally, Carr contends that he was denied a fair proceeding before an unbiased judge. To support his claim, Carr identifies the following as errors or abuses of discretion that cumulatively reflect judicial bias: (1) The court ordered Carr's presence at a noncritical stage; (2) The court improperly commented that Carr was "manipulative" based on a recording the court reviewed for a limited purpose; (3) The court permitted irrelevant and prejudicial victim impact testimony; and (4) The court required defense counsel confirm that Carr was assisting in his own defense. According to Carr, "[t]hese errors . . . when viewed cumulatively, along with the [alleged] deficiencies . . . at the priors trial and sentencing," create "a strong inference that the trial court was not an impartial trier of fact or sentencing judge in this case."

Judicial error or misconduct warrants reversal if it is " " "so prejudicial that [it] denied [the] defendant a fair, as opposed to a perfect, trial." ' ' ' (*People v. Woodruff* (2018) 5 Cal.5th 697, 769.) Courts have found such a level of prejudice where a judge's statements or actions reflect bias against the defendant, or evidence a lack of fairness in the judge's overall approach to the defendant or the trial. For example, in *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 (*Hernandez*), the judge made comments creating "the appearance [it] held preconceived ideas based on stereotypes of undocumented aliens," which in turn "raise[d] doubts about the fairness and impartiality of the proceeding" involving an undocumented alien plaintiff. (*Id.* at p. 455.) Similarly, in *Webber v. Webber* (1948) 33 Cal.2d 153, our Supreme Court held that the parties were denied a full and fair hearing based on the trial court's disparaging comments revealing an "unsympathetic attitude toward the litigation" that did "not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality." (*Id.* at p. 163.)

Even assuming Carr’s list of complaints reflected prejudicial judicial error (and, as discussed below, we conclude it does not), the nature of these complaints does not suggest any predisposition or prejudice against Carr that might “raise doubts about the fairness and impartiality of the proceeding[s].” (See *Hernandez, supra*, 109 Cal.App.4th at p. 455.) Indeed, other actions and statements by the court contradict such a suggestion. For example, the court exercised its discretion to strike 11 of Carr’s prior convictions in the interest of justice, and to impose concurrent, rather than consecutive, sentences on counts 1 and 2. It also commented at the sentencing hearing that Carr’s efforts to pursue educational opportunities were “laudable” and that the court “[does not] view [Carr] as an evil man.”

Moreover, we do not agree that all the actions Carr identifies reflect judicial error or misconduct, let alone prejudicial error. With respect to the first alleged instance of misconduct, the court was not acting outside the scope of its discretion to “specifically direct the defendant to be personally present at any particular proceeding or portion thereof.” (§ 977, subd. (b)(2); see also *id.*, subd. (b)(1) [requiring defendant to execute a written waiver before declining to appear at certain proceedings].)

The second instance of judicial misconduct Carr alleges is the court’s assessment of Carr’s credibility regarding his claimed state of mind, based on a taped statement to police. Specifically, after Carr had claimed to be unable to appear in court due to mental health issues, the court stated that “what I did hear [on the tape] was a manipulative person, which leaves me some doubts about his credibility in terms of what he’s saying today about his [mental] condition.” Carr cites no authority for the proposition that such a comment is improper because the court had reviewed the recording for an unrelated purpose. Nor did the court’s observations about Carr’s credibility in this limited context

prejudice Carr in any way. The court did not make this comment in the presence of the jury or make any formal finding regarding Carr's credibility based on the taped statement. And later, the court did not question the veracity of Carr's statements in a letter to the court requesting leniency in sentencing. To the contrary, the court noted it would take the letter into account in its sentencing decision, and that the educational efforts Carr described in the letter would constitute mitigation.

The third error Carr alleges is the court's comment, outside the presence of the jury, that the court noticed what "appeared to be collaboration between counsel and client" and that this "made [the court] very happy." The court asked defense counsel whether he concurred, and when defense counsel agreed, the court further noted "that's the whole point of assisting counsel, Mr. Carr. So I congratulate you on that." Carr offers no authority suggesting how such comments might reflect error or misconduct. Moreover, nothing about these statements suggests any predisposition against Carr, defense counsel, or the defense case.

Finally, Carr argues that the court incorrectly permitted the prosecution to elicit victim impact testimony from M.C. that was irrelevant to proving the crimes charged. We agree that, to the extent M.C.'s testimony regarding how he felt listening to the 911 recording from the day of the crimes had any relevance, that relevance was likely outweighed by its prejudicial impact and cumulative nature. (See Evid. Code, § 352.) Even so, a single evidentiary ruling against Carr is insufficient to support a claim that judicial bias permeated the proceedings, as his briefing acknowledges. Nor is there anything to suggest this ruling prejudiced Carr in any way, let alone that it reflects a general bias against Carr.

VI. Resentencing in Light of Senate Bill No. 1393

For the burglary and robbery counts, the court sentenced Carr to two terms of 36 years to life and ordered the sentences to run concurrently.⁶ These sentences reflected enhancements under the Three Strikes law in two respects. First, as “third strike” offenses, the base sentence for each was a mandatory 25 years to life.⁷ Second, the court added two 5-year enhancements for two of Carr’s prior serious felony convictions under section 667, subdivision (a)(1).⁸ The version of section 667, subdivision (a)(1) in effect at the time of Carr’s sentencing did not permit trial courts to strike prior convictions for the purposes of avoiding these five-year enhancements. Senate Bill No. 1393 changed this, however, effective January 1, 2019. Since that date, courts may exercise their discretion under section 1385 to strike, effectively, section 667, subdivision (a)(1) five-year enhancements, in the interests of justice.

In his petition for rehearing, Carr requests remand for resentencing in light of Senate Bill No. 1393. He argues that this change in law should be retroactively applied to all cases—including his—pending on January 1, 2019, when the law went into effect. Because we see nothing in the language or history of

⁶ The court also imposed a sentence of 35 years to life on count three, but stayed the sentence under section 654.

⁷ Carr’s *Romero* motion was aimed at preventing this sentencing enhancement, which the trial court had discretion to avoid by striking one of Carr’s “strike priors.” As discussed *ante*, the court properly exercised its discretion under section 1385 and denied the motion.

⁸ In light of the deadly and dangerous weapon allegation found true by the jury, Carr’s sentence on counts 1 and 2 also reflected an additional one year pursuant to section 12022, subdivision (b)(1).

Senate Bill No. 1393 suggesting the Legislature intended otherwise, we agree. (See *In re Estrada* (1965) 63 Cal.2d 740, 742 [mandating retroactive application of sentence-ameliorating statute to all judgments not yet final on the date of enactment, absent evidence of contrary legislative intent]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [applying *Estrada* to amended statute that increased court's discretion to impose lesser sentence].)

Nor do we see anything in the record suggesting such remand would be futile in this case. To the contrary, although the court found Carr should be sentenced as a third-strike offender with respect to counts 1 and 2 and declined to strike any prior "strike convictions" for those purposes, the court still exercised its discretion to lessen Carr's sentence in other ways. For example, the court could have issued additional sentencing enhancements under section 667.5, subdivision (b), based on Carr's numerous "state prison priors" (offenses committed within a certain amount of time following conviction and/or incarceration). (See § 667.5.) The court chose to instead strike these prison priors in the interest of justice, citing Carr's "age and the overall sentence, which [the court thinks] appropriately cover his criminal conduct and criminal past." The trial court also chose to impose concurrent, rather than consecutive sentencing, for the same reason.

In sum, Carr has failed to identify any prejudicial errors, let alone errors suggesting judicial bias or that call into question the impartiality and fairness of the proceedings. Nevertheless, in light of Senate Bill No. 1393's amendment to section 667, subdivision (a)(1), which went into effect after the trial court's sentencing but before the order of judgment became final on appeal, the trial court should be afforded the opportunity to consider whether to impose the sentencing enhancements under that subdivision.

DISPOSITION

We affirm. Upon remand, the trial court shall determine whether to strike any enhancements imposed under section 667, subdivision (a)(1). If the court strikes any such enhancements, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.